

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF THE POLLUTION CONTROL AGENCY

In the Matter of the Administrative Penalty  
Order Issued to Fitzgerald Excavating &  
Trucking, Inc.

**FINDINGS OF FACT,  
CONCLUSIONS, AND  
RECOMMENDATION**

The above-entitled matter came on before Administrative Law Judge Kathleen D. Sheehy for hearing on March 20, 2008, at 9:30 a.m., at the Office of Administrative Hearings. The OAH record closed at the conclusion of the hearing.

Ann E. Cohen, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, MN 55101-2127, appeared on behalf of the Minnesota Pollution Control Agency (MPCA).

Fitzgerald Excavating & Trucking, Inc. (Respondent), 20865 390<sup>th</sup> Street, Goodhue, MN 55027, did not appear in person or through counsel.

**STATEMENT OF ISSUES**

The issues presented in this case are whether the MPCA properly concluded the Respondent violated Minn. Stat. § 116.081 (2006) and Minn. R. 7001.0030, 7001.3050, and 7035.0800 (2007), and whether the \$7,859 penalty assessed by the MPCA is reasonable.

Based upon all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

**FINDINGS OF FACT**

1. On February 14, 2008, the MPCA sent by first-class mail a copy of the Notice and Order for Expedited Hearing Under Revenue Recapture Rules (Notice and Order for Hearing) to Jason Fitzgerald, Owner, Fitzgerald Excavating & Trucking, Inc., 20865 390<sup>th</sup> Street, Goodhue, MN 55027.<sup>[1]</sup>

2. The Notice and Order for Hearing scheduled the hearing to take place on March 20, 2008, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101.

3. The Notice and Order for Hearing specifically notified the Respondent that failure to appear at the hearing may result in a finding that Respondent is in default, that the allegations contained in the Notice and Order for Hearing may be accepted as true, and that its proposed action may be upheld.<sup>[2]</sup>

4. The Respondent did not appear for the hearing, nor did Respondent contact the Administrative Law Judge prior to the hearing to seek a continuance or request any other relief.

5. Because Respondent failed to appear for the hearing, the Respondent is in default.

6. Pursuant to Minn. R. 1400.8560, the allegations contained in the Notice and Order for Hearing are taken as true and incorporated by reference into these Findings of Fact.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. The Administrative Law Judge and the Commissioner are authorized to consider the charges against Respondent under Minn. Stat. §§ 14.50 and 116.072, subd. 6 (2006).

2. Respondent received due, proper and timely notice of the charges against it and of the time and place of the hearing. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. The Department has complied with all relevant procedural legal requirements.

4. Under Minn. R. 1400.8560, a default occurs when a party fails to appear without the prior consent of the judge. If the agency appears at a hearing but the party against whom the agency intends to take action does not, the allegations in the Notice and Order for Hearing shall be taken as true and deemed proved without further evidence.

5. The Respondent is in default as a result of its failure to appear at the hearing.

6. The Respondent violated Minn. Stat. § 116.081, subd. 1 (2006) and Minn. R. 7001.0030, 7001.3050, subp. 1, and 7035.0800, subp. 1 (2007), by operating a system or facility related to the collection, transportation, storage, processing, or disposal of solid waste on property owned by the Respondent at two sites in Goodhue County, without a written permit issued by the MPCA.

7. The MPCA properly considered the statutory factors in Minn. Stat. § 116.072, subd. 2 (2006), in assessing an administrative penalty in the amount of \$7,859.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS HEREBY RECOMMENDED: that the Commissioner affirm the administrative penalty order issued to Fitzgerald Excavating & Trucking, Inc.

Dated: March 21, 2008.

s/Kathleen D. Sheehy

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KATHLEEN D. SHEEHY

Administrative Law Judge

Reported: Default (Appearances digitally recorded, no transcript prepared)

### **NOTICE**

This Report is a recommendation, not a final decision. The Commissioner of the MPCA will make the final decision after reviewing the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 116.072, subd. 6(e), the Commissioner's decision shall not be made until five days after receipt of this Report. The person to whom the Order is issued may, within those five days, comment to the Commissioner on the Recommendation. The final order may be appealed in the manner provided in Minn. Stat. § 14.63 to 14.69.

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<sup>[1]</sup> Affidavit of Service by U.S. Mail (Feb. 14, 2008).

<sup>[2]</sup> Notice and Order for Hearing at 4.